Supreme Court, U. S.
FILED
JAN 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-925

ROY P. WINDHAM, et al., on behalf of themselves and all others similarly situated,
Petitioners,

v.

AMERICAN BRANDS, INC., et al., *Respondents.*

On Petition for Writ of Certiorari To the United States Court of Appeals for the Fourth Circuit

BRIEF OF COMPANY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF OF COMPANY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The company respondents [1] submit this brief in opposition to a petition for a writ of certiorari filed December 28, 1977. The petition seeks review of a 5 to 1 en banc decision of the United States Court of Appeals for the Fourth Circuit, dated October 11, 1977. That decision affirmed an order of the United States District Court for the District of South Carolina denying petitioners' motion for class certification.

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[1] The Secretary of Agriculture is also a respondent.

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that the District Court had not abused its discretion in denying class certification based on the detailed factual record in this case.

STATEMENT

The petitioners, six South Carolina tobacco farmers, brought this action in 1974, charging the respondent tobacco companies and the Secretary of Agriculture with conspiring to fix the prices paid for flue-cured tobacco sold at auction markets throughout the State of South Carolina. The complaint also alleged that the respondents had monopolized or attempted or conspired to monopolize commerce at the various markets, had conspired to restrict the amount of flue-cured tobacco that could be sold at auction, and had conspired to apportion government tobacco inspectors inequitably between South Carolina and Georgia. The case was brought as a class action, with the named plaintiffs purporting to represent over 20,000 South Carolinians with economic interests in the sale of flue-cured tobacco in South Carolina during the period 1970 through 1974.

Petitioners moved for class certification in October 1974. The parties thereafter had full discovery on the class action issues, and District Judge Robert F. Chapman received extensive documentary evidence and personally presided at the depositions of more than 20 witnesses. On September 26, 1965, Judge Chapman rendered an opinion denying petitioners' motion. That opinion, as the en banc Court of Appeals commented, "carefully and thoughtfully reviewed" the record (Ptn. App. 12a) and set forth factual findings later

described by the Court of Appeals panel and by the entire Court as "full, precise, and apposite" (Ptn. App. 8a, 28a).

1. The District Court Opinion

Briefly, the District Court found that the flue-cured tobacco market was characterized by "[t]he non-standardization of product and producer" (Ptn. App. 59a). Tobacco is a perishable commodity, the quality of which is affected by many factors, including soil type, weather conditions, the skill of the farmer, and the method of picking and curing. As a reflection of the many variations in quality, a given pile of tobacco sold on the auction floor may fall within one of 161 different grades utilized by government inspectors.

Prices paid for tobacco varied over a broad range as well. Indeed, the evidence showed that prices even for identically-graded tobacco varied from day to day, month to month, year to year, warehouse to warehouse, and market to market. The District Court found the buyers' conduct to be similarly disparate. Not all of the respondents purchased tobacco at each of the 36 warehouses or in each of the 11 different geographic areas in which the warehouses are located, and the percentage of tobacco purchased by each respondent varied from area to area, warehouse to warehouse, day to day, and year to year.

Further, the more than twenty thousand tobacco producers who comprise the purported class were found to include owners of land that had allotments,[3] lessees

[3] All of the South Carolina tobacco farmers in the purported class participate in the price-support program of the United States Department of Agriculture. The program limits tobacco production according to an "allotment" system. *See generally Warr* v. *Butz*, 379 F. Supp. 268 (D.S.C. 1974).

of allotments, sharecroppers and tenants—with each category of producer having a different economic interest in the sale of tobacco.

Because of the non-uniformity of product, price, defendants' conduct, and class members' economic interests, the District Court found that, even if a generalized conspiracy were established, there would be non-uniformity in the impact of that conspiracy on the purported class members, both as to fact and amount of damage. Indeed, the nature of the tobacco auction market was such that many farmers who produced lower-quality tobacco actually benefitted from the auction practices complained of, thereby making it impossible for them to satisfy the fact-of-damage element of a private antitrust cause of action.

Moreover, the District Court found that individual questions as to the amount of damage would predominate even as to class members who could prove injury, because there is no formula or other method by which the extent of any class member's damages could readily be determined. The necessity for analyzing thousands of individual transactions of the class members was further underscored by the fact (which petitioners concede) that a large percentage of the total transactions was not even subject to the alleged conspiracy—namely, purchases by warehousemen, by the government stabilization "pool," and by companies which, for one reason or another, petitioners did not choose to name as defendants.

Based on these and other facts, the District Court concluded that common questions did not predominate over the many individual questions in the case. As a result, Judge Chapman further concluded that a class action would be plainly unmanageable, and would, if

certified, necessarily consume years of the Court's undivided attention.[3]

2. The Panel Opinion

A divided panel of the Court of Appeals for the Fourth Circuit reversed. Neither the majority nor the dissent questioned the District Court's findings, and both acknowledged that the denial of class certification must stand absent an abuse of discretion by the District Judge. Nevertheless, Senior District Judge Wyzanski of the District of Massachusetts, sitting by designation, concluded on behalf of himself and Judge Craven that the District Court should have certified a class at least for the purpose of determining whether the respondents had violated the antitrust laws. Judge Wyzanski stated that "there is almost a rebuttable presumption that . . . a class action should be allowed where there is a plausible claim of violation of the Sherman Act" (Ptn. App. 35a-36a).

In reaching this conclusion, Judge Wyzanski expressed the view that the case would not present unusual complexities "at least as long as only issues of violation are before the tribunal" (Ptn. App. 37a). He did not, however, disagree with the District Court's determination that the case as a whole would be unmanageable and would present questions which were predominantly individual rather than common. Nor did he suggest any workable basis for deciding the myriad individual questions to which the District

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[3] The District Court conservatively estimated that, were the case to proceed as a class action, the determination of individual fact issues would require 20,000 hours, or 10 years of judicial time, assuming that the case was given undivided attention for 40 hours per week and 50 weeks per year (Ptn. App. 69a-70a, n.9).

Court had referred. Senior Circuit Judge Bryan dissented, citing the District Court's "comprehensive and closely scanned findings of fact and conclusions of law" (Ptn. App. 39a).

3. The Decision of the Court of Appeals Sitting En Banc

The Fourth Circuit granted rehearing en banc, reversed the panel, and affirmed the denial of class certification. The Court's opinion (per Judge Russell) first took note of a district court's customary discretion in deciding the practical and largely factual questions involved in determining whether a proposed class action is manageable (Ptn. App. 9a-10a). The Court then undertook a thorough review of the factual situation presented here, focused on the individual issues in the case, and reaffirmed the District Court's findings that it would be impossible to presume class-wide injury in this case or to compute damage to the individual class members on the basis of any formula.

The resulting manageability problems, the Court noted, were increased by "the variety of claims as asserted by the various plaintiffs" (Ptn. App. 12a), and by the fact that proof of liability and proof of damages were inextricably intertwined in this case (Ptn. App. 22a). Finding that a class action, even if limited to the issue of antitrust violation, would ultimately degenerate into a plethora of time-consuming, separate "mini-trials"—at odds with the purpose of Rule 23—the Court of Appeals held that the District Court had acted within its discretion in denying class certification.[4] Petitioners seek review of this judgment.

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[4] Judge Butzner dissented for the reasons stated in Judge Wyzanski's opinion for the panel (Ptn. App. 25a).

REASONS FOR DENYING THE WRIT

I. THE DECISIONS OF THE DISTRICT COURT AND THE EN BANC COURT OF APPEALS ARE MANIFESTLY CORRECT AND DO NOT WARRANT THIS COURT'S REVIEW

Despite petitioners' scattershot arguments, this case involves only the narrow question whether the District Court abused its discretion by refusing to certify a class and dismissing the complaint against unnamed class members.[5] That issue, decided by the District Court and by the Court of Appeals en banc on the particular facts of this case, is of insufficient general importance to merit Supreme Court review. In any event, the decision below is correct.

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[5] There is no dispute between the petitioners and the company respondents as to the appealability of the District Court's order. Appellate jurisdiction was specifically based on the District Court's entry of an order under Rule 54(b) dismissing the complaint against unnamed class members. Such an order is an appealable "final order" under 28 U.S.C. § 1291. *See, e.g., Ott* v. *Speedwriting Pub. Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *In Re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 216 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 752 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); *but see West* v. *Capitol Federal Savings and Loan Ass'n*, 558 F.2d 977 (10th Cir. 1977). In any event, the order denying certification in this case could be treated as appealable under 28 U.S.C. § 1292(b), for the opinions of the District Court and the Court of Appeals panel indicate that § 1292(b) certification would have been granted and accepted if necessary (Ptn. App. 32a, 75a). This case is, therefore, wholly unrelated to *Coopers & Lybrand* v. *Livesay, cert. granted* Nov. 14, 1977, which involves neither Rule 54(b) nor a § 1292(b) certification, but simply the question whether an order denying class certification, without more, is a "final order" within the meaning of 28 U.S.C. § 1291 under the so-called "death-knell" doctrine.

Rule 23(b)(3) provides, in part, that an action may be maintained as a class action if the court finds that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Pertinent to these findings are "the difficulties likely to be encountered in the management of a class action."

The law is clear that the evaluations of manageability and predominance called for by the Rule, and the ultimate decision whether to certify a class, are matters within the sound discretion of the District Court. *See, e.g., Barnett* v. *W. T. Grant Co.,* 518 F.2d 543, 547 (4th Cir. 1975); *Clark* v. *Watchie,* 513 F.2d 994, 1000 (9th Cir.), *cert. denied,* 423 U.S. 841 (1975); *Wilcox* v. *Commerce Bank,* 474 F.2d 336, 347 (10th Cir. 1973); *New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2d Cir. 1969). Petitioners concede as much (*e.g.,* Ptn. at 31, 35). Because the District Judge exercised his discretion against certifying a class action in this case, petitioners must show not merely that Judge Chapman could properly have certified the case but that the arguments favoring certification were so overwhelming that he erred as a matter of law when he failed to do so. Petitioners have made no such showing, and, we submit, could not do so on the basis of the record below.

A. The Record Provides Overwhelming Factual Support for the District Court's Discretionary Denial of Class Treatment

As the en banc Court of Appeals held, the District Court's factual findings have abundant support in the

record, and provide a solid basis for its determinations as to the predominance of individual questions and the unmanageability and inferiority of a class action in this case. Those findings, which petitioners chose not to discuss in their legal analysis, demonstrate conclusively that class certification would have turned this case into a procedural nightmare.

Against the background of an industry characterized by non-uniform products, prices, and conduct, Judge Chapman correctly concluded that the trial of the liability issue alone (*i.e.,* violation and fact of damage) on a class basis would quickly become unmanageable. Thus, even as to the single element of conspiracy, the trier of fact would have to determine whether one or more conspiracies existed, and, if so, whether they operated continually and extended to all South Carolina producers and warehouses, or covered only certain markets, warehouses, farmers, types of sales, or grades of tobacco. The difficulty in making evidentiary determinations, sorting out disputed fact issues, and preserving a sensible order of proof would escalate according to the scope of the claims.

The complications relating to the fact-of-damage element of the liability issue would also be overwhelming, in light of the District Court's uncontradicted finding that some class members actually benefitted from the auction practices complained of—thereby precluding a presumption that all class members were injured even if one or more conspiracies could be proven. As the District Court found, trial of the fact-of-damage element alone would require individual analysis of each class member's sales over a four-year period—hardly the type of factual setting necessary to satisfy

the predominance or manageability requirements of Rule 23(b)(3).[6]

Even assuming liability could be established, there would remain the staggering problem of fixing damages for those class members who could establish that they were injured. The District Court's finding, affirmed by the Court of Appeals, was that there is in this case no workable formula or other mechanical method of computing damages that could eliminate the need for a virtually endless series of mini-trials to adjudicate each putative class member's claim.[7]

The District Court also found that a bifurcated trial would not ease the formidable manageability problems created by the presence of these individual issues. As Judge Russell's opinion for the Fourth Circuit en banc states, bifurcation would be impractical because of the intertwining in this case of the issues of violation, injury, and amount of damage (Ptn. App. 21a-22a). Moreover, bifurcation would be a temporary remedy at best; the deluge of mini-trials required by class certification would not disappear, but would only be postponed (Ptn. App. 22a-24a). The facts of this case, therefore, vividly underscore the statement by the Court of Appeals for the Second Circuit that whether to grant a separate trial for part of a case "is a matter of common, garden-variety district court housekeeping, an exercise of the district court's broad discretion in controlling the order of developing facts and issues at trial." *Schine* v. *Schine,* 367 F.2d 685, 687 (2d Cir. 1966).

[6] Petitioners appear to contend that proof of individual injury is no longer required under the antitrust laws. Citing this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), they argue that "[d]amage is assumed . . . for those who deal directly with the violators" (Ptn. at 19). Obviously, *Illinois Brick* did not do away with the statutory requirement that the private antitrust plaintiff must prove that he was "injured in his business or property" by the alleged unlawful conduct. Clayton Act § 4, 15 U.S.C. § 15. *See also Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977).

[7] While petitioners continue to insist, without any factual basis, that a formula could be developed (Ptn. at 24-26), they have presented nothing to warrant this Court's disturbing the concurrent findings of both lower courts on this issue. *See, e.g., International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 343 (1977), and cases cited therein.

In view of the foregoing, Judge Chapman's decision to deny class certification was plainly within his discretion—a discretion that is entitled to particular deference here because the Judge personally supervised and was intimately familiar with the development of the complex facts on which his judgment rests. *See, e.g., New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2nd Cir. 1969).

B. Petitioners' Approach Would Eliminate the Discretion Vested in the District Courts, Contrary to Rule 23 and the Decisions of this Court

Petitioners argue in effect that district courts must grant automatic class certification in virtually every private treble-damage action that includes an allegation of conspiracy. Petitioners are forced to such an approach by the absence in the record of any evidence indicating that this case satisfies the requirements of Rule 23(b)(3). Indeed, if a district court were held to have abused its discretion by denying class status on the facts of this case, then class certification must be virtually automatic.

This was the implication of the panel opinion written by Judge Wyzanski, upon which the petitioners so

heavily rely. The panel majority attempted to create a "presumption" in favor of class certification "where there is a plausible claim of violation of the Sherman Act" (Ptn. App. 36a). While the presumption purported to be "rebuttable," and while the opinion stated that a class action need not be maintained in every case (Ptn. App. 35a), it is difficult, if not impossible, to imagine a case that would not fall within Judge Wyzanski's expansive doctrine.[8] Thus, as one commentator concluded, the panel—"[u]ndaunted by a lack of precedent"—would have in effect created "an antitrust exception to the requirements of Rule 23." 62 Cornell L. Rev. 177, 198, 199 (1976).

Such an approach would be wholly inconsistent with the language and meaning of Rule 23 and the decisions of this Court. Since class certification is to be granted under Rule 23(b) only if common questions "predominate" over individual ones, Judge Chapman need not have certified a class simply because this case, like all antitrust conspiracy cases, may involve some common questions regarding the existence of a conspiracy. The resolution of the predominance issue must depend on the facts of each case. As the Advisory Committee's Note to Rule 23(b)(3) states: "Private damage claims by numerous individuals arising out of concerted antitrust violations

[8] Certainly the requirement of a "plausible claim" of Sherman Act violation is no real limitation. Since Judge Wyzanski conceded in the same paragraph of his opinion that there was no basis even to intimate that respondents were wrongdoers, a "plausible claim of violation" apparently means nothing more than the allegations of a well-pleaded complaint. Furthermore, this Court has held that class certification may not turn on a preliminary inquiry into the substantive merits of the underlying claim, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 197-98 (1974).

may or may not involve predominating common questions." 39 F.R.D. 73, 103 (1966) (emphasis added).

Petitioners attempt to circumvent the language of Rule 23 by stressing the importance of the class action device in vindicating the claims of individual class members who may lack the means or the incentive to initiate separate proceedings. The short answer to this argument is that it cannot be relied upon to justify the creation of an unmanageable litigation or the departure from the plain letter and meaning of the Rule.

We do not suggest that class certification should be denied in all complex antitrust cases. By the same token, there is no support for the notion that a case is to be deemed certifiable as a class action simply because it is an antitrust case. Indeed, the concept of presumptive certification in certain types of cases has already been rejected by this Court. Only last Term, the Court unanimously emphasized that in cases involving racial discrimination—where class treatment is frequently appropriate—certification is not automatic and "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." *East Texas Motor Freight System* v. *Rodriguez*, 431 U.S. 395, 405 (1977). Similarly, the Court in *Eisen* v. *Carlisle & Jacquelin, supra*, 417 U.S. at 175-76, enforced the "best notice practicable" language of Rule 23(c)(2), despite petitioner's contention in that case that to do so would end the suit and frustrate his attempt to vindicate the antitrust and securities claims of individual class members.[9] As the Court held in

[9] In this connection we note the District Court's finding, affirmed by the Court of Appeals, that several of the named plaintiffs have the financial incentive to continue this suit even if class certification is denied (Ptn. App. 72a-73a, 18a).

Eisen, Rule 23 must be read as written, and should not be modified or short-circuited to accommodate any particular group of plaintiffs or type of action.

Petitioners' reliance upon a theory of automatic or presumptive certification for antitrust cases is, in effect, a concession that the record here contains no support for a conclusion that the District Court abused its discretion in denying class certification. As the en banc Court of Appeals held, the record compels the conclusion that Judge Chapman was correct in holding that common questions would not predominate, and that the case could not be managed as a class action.

II. THE FOURTH CIRCUIT'S EN BANC DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS

Apart from being correct on its own terms, the decision below accords with the body of law that has developed in antitrust cases initiated under Rule 23. While petitioners have cited some 16 instances in which the Court of Appeals' en banc decision purportedly departs from the precedents of this Court and other Courts of Appeals, these supposed "conflicts" are nonexistent. This case, for example, has nothing to do with the tolling problems the Court considered in *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), and *United Air Lines, Inc.* v. *McDonald,* 432 U.S. 385 (1977).[10] Similarly, this Court's decision in *Illinois*

[10] Petitioners also seem to claim that *American Pipe* and *McDonald* are inconsistent with the en banc Court's dictum concerning a "test case" and collateral estoppel approach (Ptn. App. 17a, 18a & nn. 30-32). Since that discussion was speculative and not critical to the Court's reasoning, we do not address it here, except to state that the Court of Appeals did not, as the petitioners suggest, hold that denial of certification was appropriate because the

Brick Co. v. *Illinois,* 431 U.S. 720 (1977), is wholly unrelated to the Rule 23 questions presented here.

With regard to claimed conflicts with the decisions of other Courts of Appeals, the en banc decision below correctly observed that these so-called "conflicts" "seem to reflect more a factual difference in the cases themselves than a difference over legal principles" (Ptn. App. 15a). Unlike the situation here, in many of the cases cited by petitioners, classes were certified because the facts permitted a presumption of common injury. Further, the amount of damages could be computed by a formula or other workable method short of individual "mini-trials." Hence these cases, rather than pinpointing a need for Supreme Court review, emphasize the folly of automatic class certification of antitrust cases and the wisdom of an approach that allows district courts the discretion to decide class action questions in light of the particular circumstances of each case.

Finally, the Fourth Circuit's en banc decision does not conflict with either *In re Sugar Antitrust Litigation,* 559 F.2d 481 (9th Cir. 1977), or *Bogosian* v. *Gulf Oil Corp.,* 561 F.2d 434 (3d Cir. 1977), *petition for cert. pending sub nom. Gulf Oil Corp.* v. *Bogosian,* No. 77-740. The Ninth Circuit in *In re Sugar Antitrust Litigation* decided only that the order certifying a class in that case was not reviewable by mandamus. The Court expressly disavowed any opinion on the merits of the certification, and cited Judge Wyzanski's panel

test case approach was superior. Rather, the Court held that the case was not certifiable because it failed to meet the requirements of Rule 23(b)(3). The Court then noted, in passing, the possibility that a "test case" approach might be utilized.

opinion in *Windham* simply to show that the District Court's certification was not such "clear and indisputable error" that mandamus would lie. 559 F.2d at 483.

Bogosian is a Sherman Act "tying" case, and the Third Circuit Court of Appeals devoted most of its opinion to issues involving the substantive elements of plaintiff's cause of action—none of which is relevant here. Significantly, the Court did not order certification of a class, but remanded the case to the District Court to reconsider whether in light of the Court of Appeals' substantive rulings, the fact-of-damage issue could be viewed as a common question. In this connection, the Court of Appeals observed that "[w]hether or not fact of damage can be proven on a common basis . . . depends upon the circumstances of each case." 561 F.2d at 454. Regarding the further possibility of bifurcation, the Third Circuit cited—but, contrary to note 35a in the *Windham* en banc opinion (Ptn. App. 21a, n.35a), did not "approve"—Judge Wyzanski's panel opinion in the present case. The Court in *Bogosian* never reached the bifurcation issue; if and when it does so, it will have the benefit of Judge Russell's en banc opinion in *Windham*.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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